



In the Matter of:

PAULINE EWALD,

ARB CASE NO. 00-077

COMPLAINANT,

ALJ CASE NO. 89-SWD-1

v.

DATE: August 21, 2000

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complaint:

Richard E. Condit, Esq.; Mick G. Harrison, Esq., *GreenLaw, Washington, D.C.*

For the Respondent:

John R. Butcher, Esq., *Commonwealth of Virginia, Richmond, Virginia*

REMAND ORDER

On July 27, 2000, an Administrative Law Judge (ALJ) filed a request for a status update on this case. The ALJ indicated that the following documents had been filed with the Office of Administrative Appeals (OAA), the Administrative Review Board's predecessor^{1/}:

1. Motion for Summary Judgment, under cover letter dated June 20, 1995, addressed to OAA's Chief Docket Clerk;
2. Motion to Strike, under undated cover letter, addressed to Joyce Claro, OAA; and

^{1/} The Secretary of Labor has delegated her authority to issue final agency decisions under the whistleblower statutes to the Administrative Review Board. Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996). A panel of two Board members decided this appeal pursuant to the Secretary's Order. *Id.* at §5.

3. Opposition to Ewald's Motion to Strike, under cover letter dated July 26, 1995, and addressed to Chief Docket Clerk, Office of Administrative Appeals.

The Board's computerized docket system contains no indication that the OAA received these documents and a search of the file room failed to locate a file containing the documents. Thus, the Board had not acted upon them. Upon request, the Office of Administrative Law Judges provided the Board with copies of the documents. Our disposition of the motions follows.

BACKGROUND

Pauline Ewald has filed a complaint alleging that the Commonwealth of Virginia (Virginia) fired and blacklisted her in retaliation for engaging in activity protected under the whistleblower protection provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610 (1988)(CERCLA); the Resource Conservation and Recovery Act, 42 U.S.C. §6971 (1988) (RCRA); the Clean Water Act, 33 U.S.C. §1367 (1988) (CWA); and the Safe Drinking Water Act, 42 U.S.C. §300j-9(i) (1988) (SWDA). Following substantial discovery, Virginia filed a motion to dismiss on the ground that Ewald was collaterally estopped from litigating her claim as a result of a final order issued in another action brought by Ewald in the United States District Court for the Eastern District of Virginia, *Ewald v. Commonwealth of Virginia Department of Waste Management*, CA-90-494-R (April 22, 1991)(*Ewald I*), *aff'd per curiam*, 972 F.2d 339 (4th Cir. 1992). In response, the ALJ issued a "Recommended Order Granting Summary Decision and Dismissing." *Ewald v. Commonwealth of Virginia*, Case No. 89-SDW-1 (Oct. 19, 1992).

Upon review, the Secretary of Labor determined that the ALJ had improperly invoked the doctrine of collateral estoppel in recommending dismissal of Ewald's complaint. The Secretary noted that the burden of proof applied in *Ewald I* was much more stringent than is applied in environmental whistleblower cases. Accordingly, because "it is well established that a party should not be precluded from litigating an issue in a second case where the burden of persuasion on the issue was greater in the first case," the Secretary rejected the ALJ's recommended decision and remanded the case to the ALJ for further proceedings consistent with his decision. *Ewald v. Commonwealth of Virginia*, Case No. 89-SDW-1, Sec'y Dec. and Rem. Ord. (April 20, 1995).

Subsequent to the Secretary's remand of the case to the ALJ, Virginia filed a Motion for Summary Judgment with the Secretary arguing that even under the less stringent burden of proof applicable to whistleblower cases, Ewald had not raised a genuine issue as to any material fact. Ewald, in a Motion to Strike, responded that Virginia improperly filed the Motion for Summary Judgment with the Secretary because the Secretary had remanded the case to the ALJ for his further consideration. Virginia replied that, "[t]he Secretary's jurisdiction is not affected by his present delegation of the matter to [the ALJ]." Commonwealth's Opposition to Ewald's Motion to Strike at 2.

DISCUSSION

The Board agrees with Ewald that Virginia did not properly file its Motion for Summary Judgment with the Secretary. The Secretary has promulgated regulations establishing the proper

procedure for the adjudication of whistleblower cases. 29 C.F.R. Part 24. The **only** provision addressing the procedure for invoking the ARB's review states in relevant part:

(a) Any party desiring to seek review, including judicial review, of a recommended decision of the administrative law judge shall file a petition for review with the Administrative Review Board ("the Board"), which has been delegated the authority to act for the Secretary and issue final decisions under this part. To be effective, such a petition must be received within ten business days of the date of the recommended decision of the administrative law judge

29 C.F.R. §24.8 (1999). Thus, to invoke the Board's review, the party seeking such review must first present the request for review to an Administrative Law Judge and obtain a recommended decision and order. In this case, because the ALJ has issued no recommended decision and order on Virginia's Motion for Summary Judgment, there is no recommended decision and order subject to review pursuant to 29 C.F.R. §24.8.

CONCLUSION

Accordingly, we **DENY** Virginia's Motion for Summary Judgment,^{2/} and **REMAND** this case to the ALJ for further proceedings consistent with the Secretary's April 20, 1995 Decision and Remand Order in this case.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

^{2/} Our disposition of Virginia's Motion for Summary Judgment renders Ewald's Motion to Strike moot. Further, while we are not inclined to "enjoin[] [Virginia] from filing any additional documents with the Secretary or the ALJ without first seeking permission," Complainant's Motion to Strike at 2, we expect that the parties will adhere to the governing procedural regulations. See 29 C.F.R. Part 24.